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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 305

WRIGHT CONTRACTING COMPANY, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

**PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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The petitioner, Wright Contracting Company, pursuant to Rule 58(2) of the Rules of the Supreme Court, prays that the Court will rehear its petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit and that upon such rehearing it will order that the writ be granted.

## PRIOR PROCEEDINGS

The findings of fact and opinion of the Tax Court (R. 33-70) are reported at 36 T. C. 620. The opinion of the Court of Appeals (Pet. 2a-12a) is reported at 316 F. 2d 249. This Court on October 21, 1963, denied the petition for a writ of certiorari. On November 14, 1963, the time within which the petitioner may file this petition for rehearing was extended by an order entered by Mr. Justice Black to and including December 20, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## GROUNDS FOR THE PETITION

When this proceeding was in the Tax Court it was reconsidered during a period of about five months because of an asserted conflict between it and the opinion in *American Can Co.*, 37 T. C. 498 (R. 40, 72-78). Four of the Tax Court judges in their dissent in the cited case expressed the view that the two cases were "certainly not distinguishable" (37 T. C. at 220-221).

In *American Can Co. v. Commissioner*, 2 Cir., 317 F. 2d 604 (1963), the Court of Appeals relied on the holding of the Fifth Circuit in the present proceeding in reversing the opinion of the Tax Court (317 F. 2d at 606).

On December 4, 1963, the *American Can Co.* filed a petition for a writ of certiorari (October Term, 1963, No. 656) in which the first question presented is stated as follows (Pet. 2):

> (1) Whether the Commissioner may require an accrual basis taxpayer, for purposes of computing its federal income tax, to deduct vacation pay-

> nients and property taxes in a year other than the year in which such items accrued, where the taxpayer had in prior years deducted similar items in the wrong period.

This language parallels in principle the second question presented in the case at bar (Pet. 2). The filing of this petition by the *American Can Co.* is believed to be an "intervening circumstance" of substantial effect within the provision of Rule 58(2) of the Rules of this Court.

The line between the correction of an error and the change in a method of accounting is difficult to find. The Tax Court considered a comparable situation in the recent case of *Policy Holders Agency Inc.*, 41 T. C. No. 6 (decided October 10, 1963). Without citing either of the cases now before this Court, the Tax Court held—

> Income properly accruable in one year is not deemed income in some other year, even if it was not reported in the proper year.

The problem and the need for guidance was discussed in a recent article, Herzberg, "IRS Maintains Strict Rule for Vacation Pay Accrual; New Law Extends Relief," 19 Journal of Taxation 338, 339-340 (Dec. 1963).

Precedent for this petition and for considering together the cases of *American Can Co.* and *Wright Contracting Company* is found in *Thomas* v. *Patterson*, 368 U. S. 837, 370 U. S. 966 (No. 109, October Term, 1961).

## CONCLUSION

The petition for rehearing should be granted and a writ of certiorari should be issued so that the important issues presented may be resolved and the appropriate principles established for the future guidance of the taxpayers and the Government.

Respectfully submitted,

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*Of Counsel*

December, 1963

## CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay and that it is restricted to the grounds above specified.

SCOTT P. CRAMPTON